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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR YOUNG & COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE COURTS BELOW PROPERLY EXERCISED THEIR JUDICIAL OVERSIGHT ROLE IN ENFORCING AN IRS SUMMONS DEMANDING EVERY DOCUMENT IN A THIRD-PARTY RECORD KEEPER'S FILE IN ANY WAY RELATING TO THE TAXPAYER WHEN THE SOLE BASIS FOR THE FINDING OF RELEVANCY WAS THE *IPSE DIXIT* OF THE IRS AGENTS AND WHERE THE GOVERNMENT CONCEDED THE IRS DID NOT KNOW WHAT IT WANTED.

WHETHER A SUMMONS FOR ALL NON-TRANSACTIONAL DOCUMENTS OF A THIRD-PARTY RECORD KEEPER IN ANY WAY RELATING TO THE TAXPAYER WITHOUT REGARD TO THEIR RELEVANCY VIOLATES THE FOURTH AMENDMENT.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	(i)
PARTIES TO THE PROCEEDING BELOW	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Normal IRS Procedures	7
B. The Audit Function and Audit Workpapers	7
REASONS FOR GRANTING THE WRIT	8
A. The Material Sought Must Relate to the Correctness Of The Tax Return	9
B. Relevancy Cannot Be Presumed Merely Because the Workpapers Relate to Financial Accounting	10
C. Requests for Documents by Generic Description Cannot Meet the Relevancy Test and Conflict with the Decisions of Other Circuits	12
D. The Courts Below Abdicated Their Judicial Oversight Function By Accepting the IRS Claim or Relevancy Without More	14
E. An IRS Summons for Non-Transactional Documents Setting Forth Nothing More Than Their Generic Characteristics Fails to Comply with Constitutional Requirements and Is Unenforceable	16
CONCLUSION	18

TABLE OF AUTHORITIES

PAGE

Cases

American Automobile Assn. v. *United States*, 367 U.S. 687 (1961) 11
Brown v. *Helvering*, 291 U.S. 193 (1934) 12
C.A.B. v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976) 14
Commissioner v. *Hansen*, 360 U.S. 446 (1959) 12
Commissioner v. *Idaho Power Co.*, 418 U.S. 1 (1974) ... 11
Donaldson v. *United States*, 400 U.S. 517 (1971) 16
Fisher v. *United States*, 425 U.S. 391 (1976) 16, 17
Frank Lyon Co. v. *United States*, 435 U.S. 561 (1978) .. 11
FTC v. *American Tobacco Co.*, 264 U.S. 298 (1924) 17
Hubner v. *Tucker*, 245 F.2d 35 (9th Cir. 1957) 15
Lucas v. *American Code Co.*, 280 U.S. 445 (1930) 12
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946) 16
See v. *City of Seattle*, 387 U.S. 541 (1967) 16
Thor Power Tool Co. v. *Commissioner*, 439 U.S. 522 (1979) 10, 11
United States v. *Acker*, 325 F. Supp. 857 (S.D.N.Y. 1971) 12
United States v. *Berkowitz*, 355 F. Supp. 897 (E.D. Pa. 1973) 15
United States v. *Bisceglia*, 420 U.S. 141 (1975) 15, 17
United States v. *Blackwood*, 582 F.2d 1244 (10th Cir. 1978) 13 n.17
United States v. *Coopers & Lybrand*, 413 F. Supp. 942 (D. Colo. 1975) *aff'd.* 550 F.2d 615 (10th Cir. 1977) 13
United States v. *Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977) 14
United States v. *Coson*, 515 F.2d 906 (9th Cir.), *cert. denied*, 423 U.S. 927 (1975) 17
United States v. *Harrington*, 388 F.2d 520 (2d Cir. 1968) 15
United States v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978) 10
Unites States v. *Life Science Church of America*, 636 F.2d 221 (5th Cir. 1980) 13
United States v. *Luther*, 481 F.2d 429 (9th Cir. 1973) ... 13

PAGE

United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) 17

United States v. *Powell*, 379 U.S. 48 (1964) 14, 16

United States v. *Theodore* 479 F.2d 749 (4th Cir. 1973) 15

Venn v. *United States*, 400 F.2d 207 (5th Cir. 1968) ... 13, 15

Statutes and Rules

Internal Revenue Code of 1954
26 U.S.C. § 7602 (1976) 2, 9

Judiciary and Judicial Procedure
28 U.S.C. 1254(1) 2

Rule 19.5 of the Supreme Court of the United States 2

Other Authorities

Brief for the Government in *Thor Power Tool Co.* v. *Commissioner* (August, 1978) 10 n.14

1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, (1958) 17

Internal Revenue Manual-Audits § 403(23) 7

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CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PARTIES TO THE PROCEEDING BELOW

Arthur Young & Company ("AY") is a partnership of Certified Public Accountants with over 600 partners and offices at 70 locations in the United States. Intervenor Amerada Hess Corporation ("Amerada") is a public corporation whose shares are traded on the New York Stock Exchange.

OPINIONS BELOW

The order of the district court (App. A, 1a-15a)[1] is reported at 496 F. Supp. 1152. The opinion of the court of appeals (App. B, 16a-39a) is reported at 677 F.2d 211.

1. The appendix references are to the appendix to the Petition for Writ of Certiorari of the Unites States of America in No. 82-687.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1982 (App. C, 40a). The order denying the government's petition for rehearing was entered on June 22, 1982 (App. D, 41a). By order dated September 13, 1982, Justice Marshall extended the time within which the United States could file a petition for a writ of certiorari through October 20, 1982. On October 20, 1982 the United States filed a timely petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition is being filed pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States.

STATUTE INVOLVED

The pertinent provision of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C. § 7602) is set forth in App. E, 42a.

STATEMENT OF THE CASE

At issue are workpapers created by certified public accountants in the course of an audit of a client's financial statements and the relationship these audit workpapers have to a client's federal income tax return.

As part of the Internal Revenue Service ("IRS") audit of Amerada's tax returns for 1972, 1973, and 1974, the IRS issued a

summons[2] to AY[3] which demanded every piece of paper in AY's Amerada file—more than a quarter of a million pages. Rather than seeking documents by subject matter, the summons defined

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2. The summons requested:

> The following Document Relating to Amerada Hess Corporation All For the Years 1972 Through 1974:
>
> 1. Engagement letter(s)
> 2. Management letters(s)
> 3. Representation letter(s)
> 4. History file(s)
> 5. Standard workpaper index(s)
> 6. Administrative file(s)
> 7. Workpaper review files(s)
> 8. Engagement planning file(s)
> 9. Confirmation control file(s)
> 10. Significant event file(s)
> 11. Audit program file(s)
> 12. Audit workpaper's file(s)
> 13. Tax pool analysis file(s)
> 14. File(s) prepared during the course of work performed for the "special committee", including agreed procedures, selection process, reports, schedules and other workpapers.
> 15. The name of the partner in charge, engagement partner and/or senior auditor who directed the audit of Amerada.
> 16. Any other information pertinent to the audit of Amerada covering the years 1972, 1973 and 1974.
> 17. All workpapers, reports, records, correspondence, reconciliations and information relative to the United States Corporate Income Tax Returns (Forms 1120) of Amerada . . . that were prepared by AY or under the supervision of AY for the calendar years 1972, 1973 and 1974.

3. AY has continuously audited Amerada's annual financial statements since its appointment as independent auditor in 1971. AY also signed the Amerada tax returns even though AY was not the tax return preparer and IRS Practice Guidelines did not require it to sign the tax return. However, both as a condition of the Amerada engagement and under the AICPA's Standards of Professional Responsibility for Tax Return preparers, AY signed Amerada's returns.

what was to be produced by the generic characteristics of the documents—*e.g.*, history file, significant events file, administrative file, etc.[4]

Because of the use of a request which defined the documents sought by the generic characteristics of the document (*e.g.*, letter, memo, etc.) as opposed to substantive content (*e.g.*, inventory), it was impossible to test the relevancy of the demand from the face of the summons. Accordingly, AY advised the IRS it would not give *carte blanche* access[5] to AY's files unless the IRS specified the subject matter[6] of its inquiry so the relevancy of its request could then be tested.

The IRS refused to do so and, eighteen months after service of the summons, moved by order to show cause to compel production. In support of its motion, the IRS submitted an affidavit which merely repeated the language of the summons and concluded that the IRS needed this material "to ascertain the correctness of the tax returns". The only attempt to point to any specific subject matter in what was sought was in ¶ 10 of that affidavit:

> 10. The taxpayer has disclosed that it maintained a fund called a "special disbursements account." From this fund, it made political contributions, some of which were reimbursed to the actual contributors, and charged to legal fees, gave gifts to foreign government employees and

4. Even if it is assumed that the generic descriptions in the first few paragraphs of the summons provide some "specificity," they were rendered meaningless by ¶¶ 12 and 16 which requested that AY produce all workpapers (thereby including everything in AY's files and duplicating ¶¶ 1 to 11, 13 and 15 of the summons.)

5. AY has never questioned either the propriety or scope of ¶ 17 of the summons—the only paragraph which was properly drawn and relevant on the face of the summons and has always stood ready to produce these documents.

6. AY does not suggest by this that the IRS must cast its summons in terms of specific documents—*i.e.* memo from Jones to Smith—but rather it should define its demand in terms of the subject matter it is investigating—*e.g.* inventory write down, bad debt deduction. Surely, the IRS knows what items it wishes to audit. If it is either unable, as in the instant action, or unwilling to identify these subject matters, its request is no more than a fishing expedition which has been repeatedly condemned by this Court.

> deducted the same as "other deductions;" gave sums to members of local police and fire departments and deducted the same as "cleaning services," made payments, which were deducted, to a foreign "expeditor," and engaged in other possibly illegal activity. . . .

Yet the documents demanded far exceeded this limited showing of relevancy.[7]

After AY noted that the IRS submission had failed to make any showing of relevancy, the IRS submitted three short reply affidavits which merely repeated the bald statement that the IRS needed the summoned records "to ascertain the correctness of the 1972, 1973, and 1974 returns."

In contrast to the self-serving statements of the IRS agents, the Assistant U. S. Attorney conceded to the district court in a reply affidavit "that at this stage of the investigation the agents did not have sufficient information to further specify the documents summoned."[8]

At the hearing before the district court, counsel for AY again repeated its offer that if the IRS defined its request by subject matter—not document characteristic—AY would produce those documents.[9] The IRS refused this offer too.

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7. This is the type of subject matter description which AY believes is proper and satisfies due process requirements. To the extent AY had any documents in its files (other than those generated for the attorneys as part of their investigation and which the trial court found protected by the attorney work product privilege) AY was prepared to make available all of its documents which related to the subject matter identified in ¶ 10 of the affidavit.

8. *See also* Liggio affidavit, dated December 28, 1979 ¶ 12 (Record below A.37):

> I advised Ms. Trager that Arthur Young was prepared to make a production of relevant materials . . . if the IRS was prepared to identify by subject matter those areas in which it was interested. . . . Ms. Trager advised me that she would consult with the special agents to see if this could be done. She subsequently advised me . . . that *the agents did not know what they wanted* and that they, therefore, needed to look at everything. (Emphasis added).

9. At the district court hearing, the following colloquy occurred:

> MR. LIGGIO: . . . when Mr. Kalemba first served [AY] with a subpoena, I said . . . "Look, you are overly broad, but if you tell us what you want by subject matter, and I think you are in a

Following the hearing, and probably in response to the court's comments, the IRS submitted still another affidavit—its fifth—on the subject of relevancy. This affidavit provided no better evidence of relevancy than anything the IRS had submitted before; in fact, it demonstrated that certain of the material sought could not be relevant, that the summons was too broad, and that the IRS summoned materials not in any way relevant to "ascertaining the correctness" of Amerada's return.[10] The district court nevertheless enforced the summons for all documents in AY's Amerada file.

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position to do that, you have audited Amerada Hess for years and you have the records available for '72, '73 and part of '74, . . . tell us what you want and we don't say you can't have the documents. We are prepared to work with you and make documents available to you and we are perfectly willing, if the government says they need something relating to drilling costs for the domestic production, you know, subject matter categories, we will go into our papers and find them.

• • •

I offered to the government, to Mr. Kalemba and Ms. Trager, to tell us what they want and we will make our personnel available—

THE COURT: Well they wouldn't tell me, either, so don't feel put out.

Counsel for Amerada then noted:

The IRS, since the inception of this audit in 1975, has given us some 400 civil document requests and we have given them documents in response to 398 of them. While the government contends that they have no ability to get any information from Amerada Hess, that is simply totally inaccurate.

THE COURT: They can't figure out what is relevant; that is their problem.

Notwithstanding the uncontradicted record that the government was unable to demonstrate the relevancy of what they sought, the summons was enforced.

10. This affidavit stated:

9. The engagement planning questionnaire (item 8), when read in conjunction with the engagement letter, would indicate the scope of the audit. *Obviously, if the audit was not involved with areas which are the subject of the investigation it would be unnecessary to examine the records further.* (Emphasis Added.)

Implicit in this is the recognition that the areas of IRS examination and the AY audit of Amerada were not co-extensive and therefore all workpapers were *not* relevant.

The court of appeals summarily affirmed the district court's order enforcing the summons without any critical review of the record with respect to the audit workpaper issue.

A. The Normal IRS Procedures

The procedure used to obtain documents from AY, a third-party record keeper, stands in stark contrast to the procedures used with respect to the corporate taxpayer in general, and Amerada in particular, as mandated by the IRS' own manual. In accordance with the procedures set out in Internal Revenue Manual-Audit § 403(23)[11], the IRS issued to Amerada 400 detailed civil document requests which defined the request by subject matter—not by generic document characteristic. In response to these demands Amerada produced in excess of 40,000 pages to the IRS.

Had the IRS observed the same procedures with AY, the relevancy of its request would have been clearly determinable on its face.

B. The Audit Function and Audit Workpapers

Financial statements of a company are audited in accordance with "Generally Accepted Auditing Standards" ("GAAS") to determine whether they have been prepared in accordance with Generally Accepted Accounting Principles ("GAAP").

An audit does not involve the verification of every item in the books and records of a client; rather it is an examination of selected items and records to determine whether the financial statements appear to be free of material misstatements. The auditor develops an audit plan and audit programs which are guidelines (methodology) for the conduct of the audit and which determines the areas to be examined.

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11. Form for Requesting Information or Documents from Taxpaper (1) Form 4564 (Information Document Request) is designed for requesting information or documents from taxpayers when there are voluminous records to be examined, or when it is desirable to document requests. The form provides a convenient means to request information, and simultaneously yields a permanent record of what was requested, received, and returned to the taxpayer.

Audit workpapers are prepared during the audit to (i) document compliance with GAAS, (ii) facilitate supervision and review of the work, and (iii) provide a record of the work. They contain a myriad of facts and opinions many of which, however, have *absolutely no conceivable relevance* to a corporation's tax return, let alone to its correctness[12] because, as this court has repeatedly noted, financial and tax accounting are not the same. *See infra*, 10-12. Similarly, where the IRS is examining only certain issues on the taxpayer's return, the full panoply of workpapers relating to every aspect of a client's financial statements cannot be relevant to the IRS investigation.

REASONS FOR GRANTING THE WRIT

Without any critical analysis of the issue, both the district court and court of appeals summarily rejected AY's position that a request for documents based on their generic characteristics cannot establish relevancy without a further definition of the subject matter sought. In so doing both courts applied an improper standard in determining relevancy and abdicated their judicial oversight function of the IRS. Moreover, the opinions of both courts are in direct conflict with the opinions of this Court and with the decisions of other circuit courts of appeal. Finally, a summons, such as the instant one, violates the Fourth Amendment.

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12. For example, workpapers dealing with FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT ("FASB") No. 8 issues (Foreign currency translation) are totally irrelevant to Amerada's U.S. tax liability. Yet the generic document requests of Paragraphs 3, 7, 8, 10, 12, and 16 of the summons call for production of these papers. Similarly, all workpapers dealing with FASB 19 (the pronouncement relating to oil and gas accounting) can have absolutely no bearing on the correctness of Amerada's tax return.

Other workpapers which have no relevance to the correctness of a tax return include (i) earnings per share calculations, (ii) compliance work with debt agreements, (iii) accounting for good will, (iv) accounting for foreign earnings, and (v) accounting for subsidiaries on the equity method, to name but a few examples. Thus a document request seeking audit workpapers, on its face, lacks relevance to any legitimate IRS purpose.

Lest there be any confusion, AY is NOT suggesting that materials contained in its workpapers are not subject to IRS scrutiny.[13] AY readily concedes that the workpapers may contain information which is relevant to an IRS inquiry and to which the IRS is entitled. AY's position is simply that this is the *only* material to which the IRS is entitled, and it may not and should not be able to conduct a fishing expedition through a third-party's papers based on an unsupported claim of relevancy.

Consistent with the substantial precedent established by this Court, as a predicate to enforcement of an IRS summons—at least to a third-party—the summons must describe its demands in terms of subject matter so that the issue of relevancy of the materials sought can be tested on the face of the summons. Simply put, a summons which requests, for example, all correspondence without more cannot on its face be tested for relevancy and is *per se* improper. However, a request defined as all correspondence *relating to* inventory can be easily tested for relevancy against the subject matter of the investigation.

Moreover, the issues raised by this petition are not *sui generis* to this case, but repeatedly arise with respect to the many thousands of summons the accounting profession receives on an annual basis from the IRS, other government agencies, and private litigants. A resolution of the proper standards for determining relevancy and the appropriate level of judicial review will foster judicial economy and serve to defuse a growing problem for the accounting profession in responding to the continually overbroad demands for documents in their possession.

A. The Material Sought Must Relate to the Correctness of the Tax Return

Section 7602 limits the purposes for which a summons may be issued to four situations:

> In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only:

13. Nor do we argue that there must be an *in camera* inspection to determine what is relevant. AY's proposed approach would in all but the rarest of instances obviate the need for an *in camera* inspection.

> for "ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability."

United States v. *LaSalle Nat'l Bank*, 437 U.S. 298, 317 n.18 (1978).

The validity of a summons must be tested against these four grants of power only the first of which—"ascertaining the correctness of" Amerada's return—is applicable here.

B. Relevancy Cannot Be Presumed Merely Because the Workpapers Relate to Financial Accounting

Implicit in both the IRS's position below and the opinions of both courts below is the assumption—indeed almost presumption—that because AY conducted an audit for purposes of expressing an opinion on Amerada's financial statements, the relevancy of *all* of its workpapers is therefore *a fortiori* established. Put another way, any document relating to financial accounting is presumptively relevant to "ascertaining the correctness" of the tax return. This logic is erroneous and runs counter to previous positions consistently taken by the IRS[14] and the pronouncements of this Court.

In *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522 (1979) the taxpayer had written down obsolete inventory in compliance with GAAP for financial reporting purposes and then attempted to take a corresponding tax deduction in the amount of the write down. The IRS disallowed the deduction.

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14. In its brief before this Court in *Thor Power Tool Co.* v. *Commissioner of Internal Revenue*, 439 U.S. 522 (1979) the IRS took the exact opposite tact from that which it takes here:

> . . . generally accepted commercial accounting practices do not govern the computation of federal income tax liability. . . What constitutes a fair and accurate statement of a taxpayer's income in a report to creditors or stockholders, or even for purposes of complying with some other statute, does not necessarily coincide with what must be reported as income under the taxing statute; each report is designed to serve discrete needs and objectives.

Brief for the Government in *Thor Power Tool Co.* v. *Commissioner*, August 1978 at 21-22.

This Court noted that although GAAP may have some bearing on taxes in some circumstances, it expressly rejected any presumption that "generally accepted accounting practices will pass muster for tax purposes." *Id.* at 540.

> . . . the presumption [Thor] postulates is insupportable in light of the vastly different objectives that financial and tax accounting have. The primary goal of financial accounting is to provide useful information to management, shareholders, creditors, and others properly interested; the major responsibility of the accountant is to protect these parties from being misled. The primary goal of the income tax system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc. Consistently with its goals and responsibilities, financial accounting has as its foundation the principle of conservatism, with its corollary that "possible errors in measurement should be in the direction of understatement rather than overstatement of net income and net assets." In view of the Treasury's marked ly different goals and responsibilities, understatement of income is not destined to be its guiding light. *Given this diversity, even contrariety, of objectives,any presumption of equivalency between tax and financial accounting would be unacceptable. . . . Financial accounting, in short, is hospitable to estimates, probabilities, and reasonable certainties the tax law, with its mandate to preserve the revenue, can give no quarter to uncertainty. This is as it should be.* (Emphasis Added).

Id. at 542-543.

> Finally, a presumptive equivalency between tax and financial accounting would create insurmountable difficulties of tax administration.

Id. at 544.[15]

Accord: Frank Lyon Co. v. *United States,* 435 U.S. 561, 577 (1978); *Commissioner* v. *Idaho Power Co.,* 418 U.S. 1, 15 (1974); *See also American Automobile Assn.* v. *United States,*

15. AY recognizes that financial and tax accounting are notwithout connection. But the fact that they may in some circumstances be interrelated to each other does not *ipso facto* establish relevancy.

367 U.S. 687, 690 (1961); *Commissioner* v. *Hansen*, 360 U.S. 446 (1959); *Brown* v. *Helvering*, 291 U.S. 193 (1934); *Lucas* v. *American Code Co.*, 280 U.S. 445, 449 (1930).

Since there is no presumptive nexus between financial accounting and tax accounting, more than *ipse dixit* must be shown by the IRS to establish relevancy. The nature of the IRS request must be "carefully scrutinized" and the relevancy of what is sought tested against the subjects of the investigation. No attempt was made to do that here. Mere generalized assertions of need and relevance of audit workpapers do not meet the relevance standard established by this Court. *See, infra* 14-16.

C. Requests for Documents by Generic Description Cannot Meet the Relevancy Test and Conflict with the Decisions of Other Circuits

The district court summarily rejected AY's position that broad generic document requests are impermissible, 496 F. Supp. at 1155,[16] based upon a misreading of *United States* v. *Acker*, 325 F. Supp. 857 (S.D.N.Y. 1971). Although there the court enforced a limited, generic request to the taxpayer for all Board minutes, which request included both relevant and not relevant material, it nevertheless noted that a generic request for virtually all documents would not pass muster even if made to the taxpayer. *Id.* at 861, n.3. The court of appeals' affirmance of the district court on this issue squarely conflicts with the holdings of other circuits.

Thus where broad generic requests have been made to third parties, the courts have modified them unless the request dealt with the transactional records themselves—*i.e.*, the documents

16. The district court misperceived AY's argument when it said "The end result of [AY's] argument about generic document demands would be that a reviewing Court must test each piece of paper for relevance." 496 F. Supp. at 1155. This is not AY's argument or the result that would follow from it. AY's position is that an IRS summons to a third-party must identify the *subject matter* sought (not document type, which bears no relationship to subject matter—i.e., a "letter" can relate to inventory or getting tickets to a baseball game); and it is the subject matter of the inquiry against which the demand must then be tested for relevancy.

evidencing the transactions.[17] Accordingly, in *United States* v. *Luther*, 481 F.2d 429, 433 (9th Cir. 1973) the Ninth Circuit modified a broad, generic request (*e.g.*, "correspondence, books, other records") by limiting it to those portions of the documents showing the receipts and disbursement of money or relating to financial or property transactions. *See also United States* v. *Blackwood*, 582 F.2d 1244, 1246 (10th Cir. 1978) ("business records . . . pertaining to savings and checking accounts held therein by the taxpayer".)

More specifically, it has been recognized that a summons for all of a third party's records dealing with a particular taxpayer is too broad when the matter as to which the correctness of the tax return is being examined is much narrower. *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968).

See also United States v. *Life Science Church of America*, 636 F.2d 221, 223-4 (5th Cir. 1980) where the court, in applying the same rule to the taxpayer, stated:

> The Fifth Circuit has rejected as overly broad a summons virtually identical to the one issued by the IRS in this case. That court stated:
>
> > The documents sought include *all* documents relating to the organizational structure of the church since its inception; *all* correspondence files for the period between April of 1975 and January of 1978; the minutes of *all* meetings of the officers, directors, trustees or ministers, during this same interval; and a sample of *every* piece of literature pertaining to the Church.

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17. Where the Courts have sustained generic document requests, they have involved summonses to the taxpayer itself. Moreover, these summons also have invariably involved a summons for transactional records. As the district court noted in *United States* v. *Coopers & Lybrand*, 413 F. Supp. 942, 950 (D. Colo. 1975) *aff'd*, 550 F.2d 615 (10th Cir. 1977):

> As a threshold matter, we are of the view that *actual records of transactions* should be distinguished from other data which may incidentally touch upon past or future transactions. (Emphasis Added.)

Here, no transactional records are at issue as AY had none. Indeed, the IRS has already obtained the transactional records from Amerada.

> This sample from the summons amply demonstrates that it sweeps too wide. It should not have been enforced in its present scope.
>
> *United States* v. *Holmes*, 614 F.2d 985, 988 (5th Cir. 1980) (emphasis in original) (footnote omitted).

Similarly, the Tenth Circuit noted in *United States* v. *Coopers & Lybrand*, 550 F.2d 615, 619 (10th Cir. 1977) in response to the IRS statement that it was entitled to everything in a company's files:

> However, extending IRS contentions herein to their logical conclusion, it is hard to determine what corporate records would not fall under a §7602 summonses if the standard endorsed the production of any records which *might* show tax fraud or tax liability. IRS does not, as it appears to assume on this appeal, have *carte blanche* discovery.

Compare C.A.B. v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976) (request for reading files, expense reports, memoranda is tantamount to a general search warrant and improper).

Here, the IRS has never specifically defined its areas of inquiry, and to the extent it has intimated as much, it is clearly much narrower than the items summoned. To the extent the court of appeals validated a summons for all records of a third-party record keeper, its decision is in direct conflict with those of other circuits.

D. The Courts Below Abdicated Their Judicial Oversight Function By Accepting The IRS Claim Of Relevancy Without More

Although it is unquestioned that Congress granted the IRS broad investigatory powers, it is equally clear that those powers are neither unbounded nor self-enforcing. Yet the approach adopted by the courts below has effectively made them so. The power of the IRS is circumscribed by statute with the burden of proof being on the IRS to show that it is entitled to enforcement of a summons. *United States* v. *Powell*, 379 U.S. 48 (1964).

The decisions below allowed unfettered access to every piece of paper in a third-party's files, which contain no independent transactional data, based solely on the unsupported claim of the IRS that this material is relevant. Because both the district court and court of appeals ordered production on nothing more than this, this petition raises an issue as to continued viability of the relevance standard in judicial enforcement of an IRS summons.

> Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose. . . . The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons.

United States v. *Bisceglia*, 420 U.S. 141, 146-147 (1975).

Care must be taken to prohibit the summons power from becoming a fishing expedition:

> We do not mean to suggest by this holding that respondent's fears that the 7602 summons power could be used to conduct "fishing expeditions" into the private affairs of bank depositors are trivial.

Id. at 150-151.

> The importance of judicial scrutiny of such orders before any punitive action is taken was recognized by the Supreme Court. . . . This judicial protection against the sweeping or irrelevant order is particularly appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealing with the person under investigation.

United States v. *Harrington*, 388 F.2d 520, 523 (2d Cir. 1968).

Accord, United States v. *Berkowitz*, 355 F. Supp. 897, 901 (E.D. Pa. 1973); *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968) denying IRS access to third party's papers on basis of higher burden; *Hubner* v. *Tucker*, 245 F.2d 35 (9th Cir. 1957); *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973). As Justice Stewart noted in dissenting in *United States* v. *Bisceglia*,

420 U.S. at 157 "[t]he federal courts have always scrutinized with particular care any IRS summons directed to a party, *i.e.*, to a party other than the taxpayer under investigation."

The need for careful scrutiny is particularly essential when, as here, documents are summoned from other than the taxpayer. AY challenged the breadth of the summons, yet the courts failed to scrutinize it at all. By accepting the IRS claim of relevancy without more, especially in light of the concession by the Assistant U.S. Attorney that the IRS agents could not identify the subject matter of what they wanted, the courts below placed form over substance and abdicated their judicial oversight function.

E. An IRS Summons For Non-Transactional Documents Setting Forth Nothing More Than Their Generic Characteristics Fails To Comply With Constitutional Requirements And Is Unenforceable

Although the IRS may have broad summons powers, an overly broad summons violates the Fourth Amendment's protection against unreasonable searches and seizures. *United States* v. *Powell*, 379 U.S. 48 (1964); *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *Compare: Fisher* v. *United States*, 425 U.S. 391, 401 n.7 (1976). ["The taxpayers . . . have not raised arguments of a Fourth Amendment nature before this Court and could not be successful if they had. The summonses are narrowly drawn and seek only documents of unquestionable relevance to the tax investigation."] As Justice Holmes put it:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. . . . *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.*

FTC v. *American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) (emphasis added) (citations omitted). This decision was cited with approval by this Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

In each of the prior decisions of this Court dealing with the scope of the IRS summons power, the Court has carefully noted that the summons in question was narrowly drawn. *See, e.g., Fisher* v. *United States, supra; United States* v. *Bisceglia*, 420 U.S. at 146, 150-1.

> It is now settled that, when an administrative agency subpoenas corporate books or records, *the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive* so that compliance will not be unreasonably burdensome.

1 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 3.05 at 181, 3.06 at 188-89, 3.12 at 216 (1958).

It has been recognized that the IRS has on occasion proceeded "with the gracefulness of an elephant in seeking documents from private parties." *United States* v. *Coson*, 515 F.2d 906 (9th Cir.) *cert. denied*, 423 U.S. 927 (1975). Here, the elephant seeks to stampede with a summons that is not narrowly drawn and seeks every piece of paper in AY's Amerada file in contravention of the Fourth Amendment.

CONCLUSION

Based on nothing more than the bald claim that the IRS needed every piece of paper in AY's Amerada file, the courts below enforced a summons requiring production of virtually every piece of paper in an independent auditor's files relating to its client. This was done in the face of an express concession by the government that it did not know what it wanted. Not only did the IRS fail to meet its burden of establishing relevancy, but its demand violated the Fourth Amendment.

Accordingly, AY respectfully requests that this Court grant certiorari to review the conflict between the circuits and to define the proper standard of judicial review of an IRS summons to a third-party.

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